

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,
vs.

ELON MUSK,

Defendant.

Case No. 1:18-cv-8865-AJN-GWG

**SUR-REPLY IN RESPONSE TO ORDER TO SHOW CAUSE WHY DEFENDANT
ELON MUSK SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING THE
COURT'S FINAL JUDGMENT**

The SEC's Reply makes clear that its effort to hold Musk in contempt relies on a radical reinterpretation of the Order that would impose sweeping restrictions to which Musk never consented. For example, the SEC asserts that tweets that touch upon broad subjects identified for *illustrative* purposes in the Policy are *necessarily* material. The SEC also asserts that any tweet which contains "substantive information about Tesla and its business" (regardless of how immaterial the information may be as a matter of law) requires pre-approval. Reply at 10. And the SEC shows, through its selection of ten tweets, that no matter how innocuous, how well known, or how removed from the subjects mentioned in the Policy, because the tweet concerns Tesla,¹ the SEC believes Musk must have them pre-approved. The only logical reading of the SEC's position is that if Musk tweets about Tesla and does not obtain pre-approval, he risks another contempt motion. Not only is the SEC's categorical approach inconsistent with the plain language of the Order, it is also belied by the settlement negotiations between the parties. The SEC sought a broad pre-approval requirement with respect to Musk's Tesla-related tweets, was told that Tesla and Musk would not agree, and conceded the point. It now seeks to achieve through a contempt hearing that which it could not through settlement.

The SEC's position is wrong at virtually every level. The Order requires Musk to "comply with all mandatory procedures implemented by Tesla . . . regarding . . . the pre-approval of any such written communications that contain, or reasonably could contain, information material to the Company or its shareholders." Dkt. 14 at 13-4. The key question is whether Musk complied with Tesla's Policy, not whether the SEC is satisfied with Tesla's Policy. Tesla's Policy does not

¹ A sample review of the new tweets identified by the SEC shows they plainly contain no material information. *See, e.g.*, Dkt. 30-7 at 2 (commenting that electricity costs less than gasoline and therefore electric cars can be cheaper to operate); *id.* at 13 (repeating government safety results published in prior Tesla Press Release); *id.* at 14 (stating that a statement made in an article that was factually not true was "untrue"). Indeed, many of these tweets are back-and-forth with customers about everyday matters regarding Tesla ownership. *See, e.g., id.* at 5-6, 10, 13.

make any Tesla-related tweet *per se* material. Instead, it incorporates the settled legal definition of “materiality,” which is context-specific and fact-dependent, and it lists subjects that “*may*” be material “*depending on [their] significance*.” The Policy necessarily imposes an obligation on the executive to make an initial, good-faith determination as to whether a particular tweet requires pre-approval under the terms of the Policy. Even if not dispositive, it is certainly highly probative that Tesla, which established, implemented, and monitors compliance with the Policy, has stated that Musk is in compliance. Musk should not be found to have “clear[ly] and convincing[ly]” violated an Order to follow Tesla’s Policy when Tesla itself affirms that he has done so.

Moreover, Musk’s belief that the 7:15 tweet did not require pre-approval was correct. Every hallmark of immateriality is present: the tweet restated previously-disclosed information, used generalized terms, was aspirational and optimistic, and caused *no* reaction in after-hours trading. The SEC claims this is a “post hoc” rationalization. Reply at 4. To the contrary, the facts demonstrate that Musk exercised his discretion reasonably and in good faith, that his determination was consistent with well-established materiality standards applicable in SEC actions, and that his judgment was confirmed by the absence of any reaction to the tweet in after-hours trading.

The SEC also fails to show that Musk has not diligently attempted to comply with the Order. The SEC now points to *other* tweets (rather than the *60 Minutes* interview) that it suggests possibly also should have been pre-approved. These tweets, which include statements denying untrue rumors and repeating well-known safety information, prove Musk’s point. Since the Order was entered, Musk has not tweeted material information regarding Tesla. It is because he has been *complying* with the Order, not defying it, that these tweets have not required pre-approval.

Finally, the SEC misrepresents Musk’s constitutional concerns. Musk does not contend that the Order is an unconstitutional prior restraint. Rather, it is the overbroad *interpretation* of

the Order urged by the SEC that would raise serious constitutional concerns, and which the Court should therefore decline to adopt.

Musk respects his obligations to the Court, to Tesla, and to Tesla's shareholders. The SEC has failed to satisfy its heavy burden of demonstrating clear and convincing evidence warranting the imposition of the extraordinary sanction of contempt.

RELEVANT FACTUAL BACKGROUND

In the course of the negotiations that led to the entry of the Order, on September 20, 2018, the SEC sent Musk a draft Consent that required him to obtain pre-approval for *all* public statements related to Tesla. The relevant provision required that Musk: "comply with all mandatory procedures implemented by [Tesla] regarding the oversight and *approval of all of his public statements relating to the Company made in any format*[".]” Ex. 9 at 5 (emphasis added).

On September 24, Tesla's counsel responded with redline revisions to the SEC's draft Consent, removing the requirement that all Musk's communications relating to Tesla be pre-approved. The relevant provision required that Musk: "comply with all mandatory procedures implemented by [Tesla] regarding the oversight ~~and approval of all~~ of his public statements relating to the Company made in any format[".]” Ex. 10 at 5 (alteration in original).

The scope of the pre-approval requirement became a sticking point during the negotiations. Musk's counsel explained that Musk's ability to engage with customers about Tesla products is critical to Tesla's success, and that Musk would not agree to broad pre-approval of Tesla-related statements. Ultimately the operative language required pre-approval only for: "written communications that contain, or reasonably could contain, information material to the Company or its shareholders[".]” Dkt. 14 at 14. The Policy lists categories of information that "may, *depending on its significance*, be material.” Dkt. 18-1 at 1 (emphasis added).

In negotiations over the Policy, Tesla and Musk made important revisions. First, the “depending on its significance” clause was added. *Compare* Ex. 11 at 2, *with* Dkt. 18-1 at 1. Second, they excised a clause requiring discussion with Tesla’s counsel before publishing communications that “may be reasonably anticipated to invite controversy.” *Id.* at 4.

ARGUMENT

I. Musk Has Complied with the Order Because He Has Complied with the Policy.

The Order requires Musk to comply with Tesla’s Policy. As explained by Tesla, the Policy “provides examples of topics that ‘may’ be material to Tesla or its stockholders depending on the significance of the information in question.” Ex. 8 at 2. The Policy also “vests discretion in its Authorized Executives . . . to make a judgment in the first instance about whether the information contained in a written communication” meets that standard. *Id.*

Tesla—which is best positioned to interpret its own Policy—has affirmed to the SEC that Musk complied with the Policy. *Id.* at 3-4. This is meaningful evidence that Musk has satisfied his obligations. The Court can discharge its Order to Show Cause on these grounds alone.

II. The SEC’s Argument Rests on an Incorrect Interpretation of the Policy.

The SEC’s belief that Musk has not complied with the Policy rests on a reinterpretation of the Policy under which effectively all Tesla-related communications on a broad range of subjects are *per se* material and require pre-approval. *See* Reply at 4-5. But nowhere does the Policy require that all communications on the listed subjects be submitted for pre-approval regardless of their significance or context.

The Policy lists expansive categories such as “communications regarding new products” and “sales or delivery numbers or other major business developments.” Dkt. 18-1 at 1. One need not strain to find communications that implicate these categories but would be immaterial. For example, no investor would consider material a tweet urging followers to check out Tesla’s latest

vehicle (the Model Y), even though this is a communication regarding a new product. Nor would an investor find material a tweet in which Musk repeats Tesla's latest government safety rating. Under the SEC's view, both these tweets may be material and Musk must submit them for pre-approval or else be under threat of sanction. But the Policy is not categorical. It states that information on identified subjects, "*may, depending on its significance,*" be material. Dkt. No. 18-1 at 1 (emphasis added). This clause, which the SEC never mentions in its Reply, is incompatible with the SEC's current view.

The SEC asserts that Musk's interpretation of the Order—that he has the initial obligation to determine whether a tweet requires pre-approval—is wrong because it is "inconsistent with the plain terms" of the Order and because Musk does not "identify any language in the order or the Tesla Policy that grants him such discretion." Reply at 1, 10. But the SEC, despite its burden to demonstrate by clear and convincing evidence that Musk violated the Order, fails to identify any other option for who would have that discretion. In fact, there is no other plausible interpretation of the Order or the Policy. If Musk were not vested with this discretion, then he would need to submit *all* Tesla-related tweets for review by Disclosure Counsel prior to posting. That is not what the Parties agreed to, nor what the Policy or Order requires.

"[A] district court may not 'expand or contract the agreement of the parties as set forth in [a] consent decree, and the explicit language of [a] decree is given great weight.'" *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995). "Because a decree is the sole source of the parties' rights, a district court may not impose obligations on a party that are not unambiguously mandated by the decree itself." *Id.* (citations omitted). The fact that the SEC has taken a particular interpretation of the Policy that is at odds with Musk's understanding (affirmed by Tesla) means that the obligations necessarily were not "unambiguously mandated" by the Order. *Id.*

III. The 7:15 Tweet Was Not Material.

The SEC now asserts that the materiality standard in the Order and Policy “is not the same as the materiality standard that applies in SEC civil fraud actions,” because the Policy also includes language concerning communications that “reasonably could contain” material information. Reply at 4. The SEC, however, does not offer any clear definition of what this standard means (or meant at the time of the Order), effectively turning it into a sword to be yielded whenever the SEC sees fit. But a contempt order cannot be issued unless the order at issue is “clear and unambiguous.” *King*, 65 F.3d at 1058.

In any event, there is no basis in the text or negotiation history of the Order or the Policy to believe that “material” has a different meaning here than the definition used every day by the courts and the SEC in securities litigation. Surely, if something is in fact legally immaterial, that is an effective proxy for assessing the propriety of Musk’s good-faith determination that it reasonably could not be deemed material.

The SEC next argues that production forecasts are categorically material. *See* Reply at 6-7. Musk has never disputed that production forecasts may be material. Materiality, however, is fact-based, and production information can be immaterial in many contexts as well. Where, as here, the production forecasts were already in the public record, Musk’s repeating of those forecasts did not significantly alter the total mix of information.

While the SEC attempts to show the 7:15 tweet was “materially different from prior public disclosures,” Reply at 7, it does so by ignoring, downplaying, or mischaracterizing the disclosures. For example, the SEC brushes aside the significance of the January 30 Earnings Call, in which Musk stated that Model 3 production *alone* would be 350,000-500,000. Response at 10. Tesla also had publicly announced that as of Q4 2018, Model S and X vehicles were already being produced at a rate of 100,000 per year. *Id.* **This would put total production for 2019 at 450,000-**

600,000. The statement that total vehicle production in 2019 would be “around 500k” was not new information and was not inaccurate.² The SEC refers to Musk’s Earnings Call statement as “cryptic,” but does not deny its consistency with the 7:15 tweet. Reply at 8 n.6.³

Most conspicuously, the SEC boldly refers to the 7:15 tweet as “demonstrably material,” but then fails to demonstrate such. The SEC offers no expert testimony, while ignoring the expert analysis finding that the tweet did not cause any notable movement in the after-hours market. Noe Decl. ¶¶ 14-34. The SEC asserts that Musk is asking the Court “to re-write the terms of its order” to evaluate his communications “based on a hindsight analysis of whether they moved the market.” Reply at 3. Not so. The absence of market movement is compelling evidence that Musk properly determined the 7:15 tweet did not contain any material information. *United States v. Hatfield*, 2010 WL 1948236, at *1 (E.D.N.Y. May 12, 2010) (explaining that whether the relevant “acts affected [the company’s] stock price goes directly to whether this conduct mattered to investors, and thus to materiality” (citing *United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991))). Given that the SEC’s mission is to “protect investors” and “maintain fair, orderly, and efficient markets,” the SEC should care that this tweet had no impact on investors or the market.⁴

IV. Musk Has Diligently Attempted to Comply with the Order.

The SEC for the first time in this proceeding points to other Musk tweets that it deems suspect. Reply at 10 & Ex. 12 (asserting the tweets contain “substantive information about Tesla

² The SEC’s reliance on public disclosures about Tesla *deliveries* is neither here nor there. As the SEC itself points out in its Reply, delivery and production forecasts are different and the numbers can and do vary. Reply at 8 n.4.

³ The SEC also ignores the context in which the tweet was made. For example, the SEC ignores the 7:02 tweet to which the 7:15 tweet was linked. *See* Musk Decl. ¶ 8. Given the extensive available guidance, Musk’s summary, celebratory, non-specific tweet would not have “significantly altered” the total mix of information in the mind of any reasonable investor.

⁴ The SEC’s Reply affirms that it does not believe there are any disputed facts. Reply at 14. Thus, the SEC must concede that it does not dispute Musk’s statements that he believed his statement was not material nor reasonably could be, Musk Decl. ¶¶ 10-11, and that an expert confirms that the statement was not material, Noe Decl. ¶ 21.

and its business”). The SEC provides no reason, beyond the subjects of the tweets, to suggest that Musk’s failure to have them pre-approved evidences non-compliance. As discussed, *supra* at 1 n.1, these tweets plainly do not contain material information. Musk’s decision not to submit prior tweets for pre-approval reflects his compliance with the Policy because he has not tweeted material information. Musk Decl. ¶ 7.

The SEC does not address Musk’s self-censorship or his posting of a subsequent tweet, both of which are highly relevant reflections of Musk’s sincere efforts to comply with the Order.

V. The SEC Mischaracterizes Musk’s Constitutional Arguments.

The SEC argues that Musk waived his challenge to the constitutionality of the Order by consenting to its entry. Reply at 11-12. Musk, however, is challenging the SEC’s re-interpretation of the Order, which raises constitutional concerns not implicated by the Order itself. *See* Response at 24 n.9. Musk did not consent to the overbroad prior restraint that the SEC is now trying to enforce. Musk Decl. ¶ 6; *supra* at 5.⁵ And the SEC ignores the Second Circuit cases providing that, even if Musk did “consent,” such consent would be irrelevant in light of the constitutional interests implicated. *See Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963).

The SEC then argues that the First Amendment does not protect false, deceptive, or misleading speech. Reply at 12-13. But the SEC’s proffered interpretation of the Order would not only gag “false or misleading” speech; it would gag *any* Tesla-related speech. The SEC also argues that the pre-approval requirement does not implicate the First Amendment because it comes from a Tesla Policy. However, the SEC seeks to enforce its interpretation of the Policy through a court-issued contempt order. That is plainly state action. *See e.g., Crosby*, 312 F.2d at 485.

⁵ The SEC cites *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 205 (3rd Cir. 2012), where the Court upheld a waiver of First Amendment rights “where the facts and circumstances surrounding the waiver ma[de] it clear that the party foregoing its rights ha[d] done so . . . with full understanding of the consequences of its waiver.” Here, Musk did not agree to pre-censorship of all communications “relating to Tesla and its business.”

Dated: March 22, 2019

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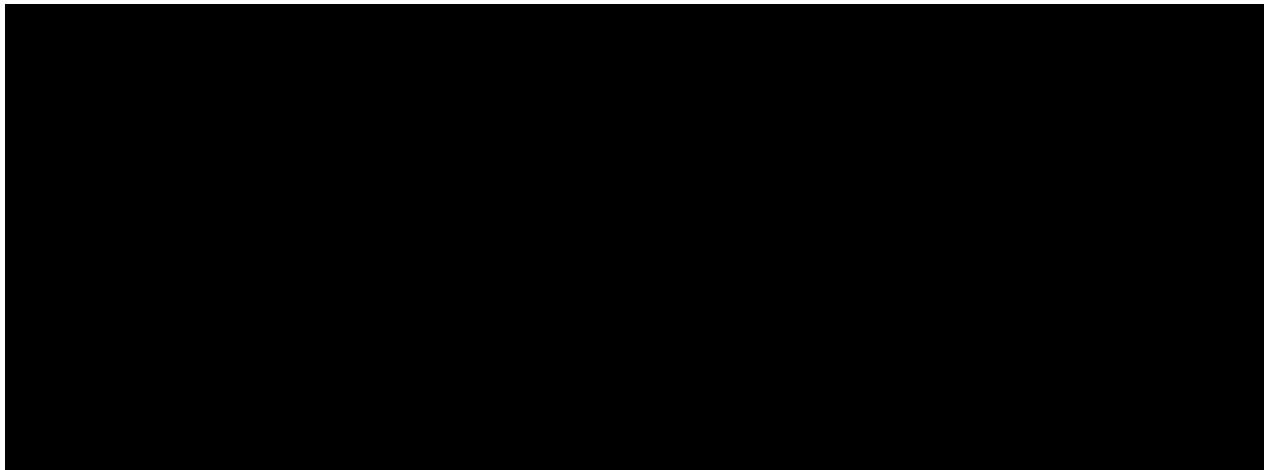
Attorneys for Defendant Elon Musk

CERTIFICATE OF SERVICE

I certify that on March 22, 2019, a copy of the foregoing was filed through the Court's CM/ECF system, which will send copies to all counsel of record.

s/ John C. Hueston
Counsel for Elon Musk

EXHIBIT 9



From: Newell, Walker S <newellw@SEC.GOV>

Date: Thursday, Sep 20, 2018, 11:12 PM

To: Farina, Steve <SFarina@wc.com>, Campos, Roel C. <roel.campos@hugheshubbard.com>

Cc: Peikin, Steven <peikinst@SEC.GOV>, Avakian, Stephanie <avakians@SEC.GOV>, Choi, Jina <ChoiJ@sec.gov>, Schneider, Erin <SchneiderE@sec.gov>

Subject: In the Matter of Tesla Motors, Inc. (SF-4082)

Steve & Roel:

Attached are drafts of a (1) complaint; (2) consent; and (3) final judgment concerning your client Elon Musk. Please provide factual corrections, if any, by the close of business tomorrow.

Regards,

Walker Newell
Counsel | Division of Enforcement
U.S. Securities & Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, California 94104
(415) 705-2325 | newellw@sec.gov

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ELON MUSK,
TESLA, INC.

Defendants.

Case No. [REDACTED]

**CONSENT OF DEFENDANT
ELON MUSK**

1. Defendant Elon Musk (“Defendant”) waives service of a summons and the complaint in this action, enters a general appearance, and admits the Court’s jurisdiction over Defendant and over the subject matter of this action.

2. Without admitting or denying the allegations of the complaint (except as provided herein in paragraph 13 and except as to personal and subject matter jurisdiction, which Defendant admits), Defendant hereby consents to the entry of the final Judgment in the form attached hereto (the “Final Judgment”) and incorporated by reference herein, which, among other things:

(a) permanently restrains and enjoins Defendant from violation of Section 10(b) of

the Securities Exchange Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];

(b) orders Defendant to pay a civil penalty in the amount of \$10,000,000 under Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]; and

(c) requires Defendant to comply with the undertaking set forth in this Consent and incorporated in the Final Judgment.

3. Defendant acknowledges that the civil penalty paid pursuant to the Final Judgment may be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended. Regardless of whether any such Fair Fund distribution is made, the civil penalty shall be treated as a penalty paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendant agrees that he shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendant’s payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by, offset or reduction of such compensatory damages award by the amount of any part of Defendant’s payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related Investor Action grants such a Penalty Offset, Defendant agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission’s counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this action. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

4. Defendant agrees that he shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any civil penalty amounts that Defendant pays pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors. Defendant further agrees that he shall not claim,

1 assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any
 2 penalty amounts that Defendant pays pursuant to the Final Judgment, regardless of whether such
 3 penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit
 4 of investors.

5 5. Defendant undertakes to:

- 6 (a) resign from his role as Chairman of the Board of Directors of Tesla, Inc.
 7 (“Chairman”) within fifteen (15) days of the filing of this Consent and agree
 8 not to seek reelection or to accept an appointment as Chairman for a period of
 9 two years thereafter;
- 10 (b) comply with all mandatory procedures implemented by Tesla, Inc. (the
 11 “Company”) regarding the oversight and approval of all of his public
 12 statements relating to the Company made in any format, including, but not
 13 limited to, posts on social media (*e.g.*, Twitter), the Company’s website (*e.g.*,
 14 the Company’s blog), press releases, and investor calls; and
- 15 (c) certify, in writing, compliance with undertaking (a) set forth above. The
 16 certification shall identify the undertaking, provide written evidence of
 17 compliance in the form of a narrative, and be supported by exhibits sufficient
 18 to demonstrate compliance. The Commission staff may make reasonable
 19 requests for further evidence of compliance, and Defendant agrees to provide
 20 such evidence. Defendant shall submit the certification and supporting
 21 material to Steven Buchholz, Assistant Regional Director, U.S. Securities and
 22 Exchange Commission, 44 Montgomery Street, 28th Floor, San Francisco, CA
 23 94104, with a copy to the Office of Chief Counsel of the Enforcement
 24 Division, 100 F Street NE, Washington, DC 20549, no later than fourteen (14)
 25 days from the date of the completion of the undertaking.

26 6. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule
 27 52 of the Federal Rules of Civil Procedure.

28 7. Defendant waives the right, if any, to a jury trial and to appeal from the entry of the

1 Final Judgment.

2 8. Defendant enters into this Consent voluntarily and represents that no threats, offers,
3 promises, or inducements of any kind have been made by the Commission or any member, officer,
4 employee, agent, or representative of the Commission to induce Defendant to enter into this Consent.

5 9. Defendant agrees that this Consent shall be incorporated into the Final Judgment with
6 the same force and effect as if fully set forth therein.

7 10. Defendant will not oppose the enforcement of the Final Judgment on the ground, if
8 any exists, that he fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and
9 hereby waives any objection based thereon.

10 11. Defendant waives service of the Final Judgment and agrees that entry of the Final
11 Judgment by the Court and filing with the Clerk of the Court will constitute notice to Defendant of its
12 terms and conditions. Defendant further agrees to provide counsel for the Commission, within thirty
13 days after the Final Judgment is filed with the Clerk of the Court, with an affidavit or declaration
14 stating that Defendant has received and read a copy of the Final Judgment.

15 12. Consistent with 17 C.F.R. § 202.5(f), this Consent resolves only the claims asserted
16 against Defendant in this civil proceeding. Defendant acknowledges that no promise or
17 representation has been made by the Commission or any member, officer, employee, agent, or
18 representative of the Commission with regard to any criminal liability that may have arisen or may
19 arise from the facts underlying this action or immunity from any such criminal liability. Defendant
20 waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the
21 imposition of any remedy or civil penalty herein. Defendant further acknowledges that the Court's
22 entry of a permanent injunction may have collateral consequences under federal or state law and the
23 rules and regulations of self-regulatory organizations, licensing boards, and other regulatory
24 organizations. Such collateral consequences include, but are not limited to, a statutory
25 disqualification with respect to membership or participation in, or association with a member of, a
26 self-regulatory organization. This statutory disqualification has consequences that are separate from
27 any sanction imposed in an administrative proceeding. In addition, in any disciplinary proceeding
28 before the Commission based on the entry of the injunction in this action, Defendant understands that

1 he shall not be permitted to contest the factual allegations of the complaint in this action.

2 13. Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e),
 3 which provides in part that it is the Commission’s policy “not to permit a defendant or respondent to
 4 consent to a judgment or order that imposes a sanction while denying the allegations in the complaint
 5 or order for proceedings,” and “a refusal to admit the allegations is equivalent to a denial, unless the
 6 defendant or respondent states that he neither admits nor denies the allegations.” As part of
 7 Defendant’s agreement to comply with the terms of Section 202.5(e), Defendant: (i) will not take
 8 any action or make or permit to be made any public statement denying, directly or indirectly, any
 9 allegation in the complaint or creating the impression that the complaint is without factual basis; (ii)
 10 will not make or permit to be made any public statement to the effect that Defendant does not admit
 11 the allegations of the complaint, or that this Consent contains no admission of the allegations, without
 12 also stating that Defendant does not deny the allegations; (iii) upon the filing of this Consent,
 13 Defendant hereby withdraws any papers filed in this action to the extent that they deny any allegation
 14 in the complaint; and (iv) stipulates solely for purposes of exceptions to discharge set forth in Section
 15 523 of the Bankruptcy Code [11 U.S.C. § 523] that the allegations in the complaint are true, and
 16 further, that any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by
 17 Defendant under the Final Judgment or any other judgment, order, consent order, decree or settlement
 18 agreement entered in connection with this proceeding, is a debt for the violation by Defendant of the
 19 federal securities laws or any regulation or order issued under such laws, as set forth in Section
 20 523(a)(19) of the Bankruptcy Code [11 U.S.C. § 523(a)(19)]. If Defendant breaches this agreement,
 21 the Commission may petition the Court to vacate the Final Judgment and restore this action to its
 22 active docket. Nothing in this paragraph affects Defendant’s: (i) testimonial obligations; or (ii) right
 23 to take legal or factual positions in litigation or other legal proceedings in which the Commission is
 24 not a party.

25 14. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small
 26 Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from
 27 the United States, or any agency, or any official of the United States acting in his or her official
 28 capacity, directly or indirectly, reimbursement of attorney’s fees or other fees, expenses, or costs

1 expended by Defendant to defend against this action. For these purposes, Defendant agrees that
2 Defendant is not the prevailing party in this action since the parties have reached a good faith
3 settlement.

4 15. Defendant agrees that the Commission may present the Final Judgment to the Court
5 for signature and entry without further notice.

6 16. Defendant agrees that this Court shall retain jurisdiction over this matter for the
7 purpose of enforcing the terms of the Final Judgment.

8
9 Dated: September __, 2018

10 _____
Elon Musk

11 On _____, 2018, _____, a person known to me, personally
12 appeared before me and acknowledged executing the foregoing Consent.

13
14 _____
15 Notary Public
Commission expires:

16
17 Approved as to form:

18
19 _____
20 Steve Farina
21 Williams & Connolly
22 725 Twelfth Street N.W.
Washington, DC 20005
Attorney for Defendant

EXHIBIT 10

From: [Bondi, Bradley J.](#)
To: avakians@SEC.GOV; peikinst@SEC.GOV; BuchholzS@sec.gov
Cc: [Bondi, Bradley J.](#); [Steven M. Farina](#)
Subject: Tesla
Date: Sunday, September 23, 2018 9:05:10 PM
Attachments: [Complaint - Redline.docx](#)
[ATT00001.htm](#)
[Tesla Consent - Redline.docx](#)
[ATT00002.htm](#)
[Tesla Final Judgment - Redline.docx](#)
[ATT00003.htm](#)
[Musk Consent - Redline.docx](#)
[ATT00004.htm](#)
[Musk Final Judgment - Redline.docx](#)
[ATT00005.htm](#)

Confidential Treatment Requested Under FOIA

Confidential Settlement Communication Subject to FRE 408

Stephanie, Steve, and Steve:

Attached please find redlines of the draft settlement documents for the company and Mr. Musk. For your convenience, we will send to you clean copies of these documents later this evening.

We would appreciate the opportunity to speak with you tomorrow morning or later, at your convenience, to explain our thinking on the revisions. Please let us know what time(s) would work best for you.

Best regards,

Brad Bondi

Bradley J. Bondi | Partner

Cahill Gordon & Reindel LLP

1990 K Street, N.W., Suite 950, Washington, D.C. 20006

80 Pine Street, New York, NY 10005

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ELON MUSK,
TESLA, INC.

Defendants.

Case No. [REDACTED]

**CONSENT OF DEFENDANT
ELON MUSK**

1. Defendant Elon Musk (“Defendant”) waives service of a summons and the complaint in this action, enters a general appearance, and admits the Court’s jurisdiction over Defendant and over the subject matter of this action.

2. Without admitting or denying the allegations of the complaint (except as provided herein in paragraph 13 and except as to personal and subject matter jurisdiction, which Defendant admits), Defendant hereby consents to the entry of the final Judgment in the form attached hereto (the “Final Judgment”) and incorporated by reference herein, which, among other things:

- (a) permanently restrains and enjoins Defendant from violation of Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5];
- (b) orders Defendant to pay a civil penalty in the amount of \$10,000,000 under Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]; and
- (c) requires Defendant to comply with the undertaking set forth in this Consent and incorporated in the Final Judgment.

3. Defendant acknowledges that the civil penalty paid pursuant to the Final Judgment may be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended. Regardless of whether any such Fair Fund distribution is made, the civil penalty shall be treated as a penalty paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Defendant agrees that he shall not, ~~after offset or reduction of any award of compensatory damages in any Related Investor Action based on Defendant’s payment of disgorgement in this action,~~ argue that he is entitled to, nor shall he further benefit by, offset or reduction of ~~such~~ any award of compensatory damages ~~award~~ in any Related Investor Action by the amount of any part of Defendant’s payment of a civil penalty in this action (“Penalty Offset”). If the court in any Related Investor Action grants such a Penalty Offset, Defendant agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission’s counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this action. For purposes of this paragraph, a “Related Investor Action” means a private damages action brought against Defendant by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

4. Defendant agrees that he shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any civil penalty amounts that Defendant pays pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution

1 fund or otherwise used for the benefit of investors. Defendant further agrees that he shall not claim,
 2 assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any
 3 penalty amounts that Defendant pays pursuant to the Final Judgment, regardless of whether such
 4 penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of
 5 investors.

6 5. Defendant undertakes to:

- 7 (a) resign from his role as Chairman of the Board of Directors of Tesla, Inc.
 8 (“Chairman”) ~~within fifteen (15) days of the filing of this Consent~~ no later than
 9 February 28, 2019 and agree not to seek reelection or to accept an appointment
 10 as Chairman for a period of two years thereafter;
- 11 (b) comply with all mandatory procedures implemented by Tesla, Inc. (the
 12 “Company”) regarding the oversight ~~and approval of all~~ of his public statements
 13 relating to the Company made in any format, including, but not limited to, posts
 14 on social media (e.g., Twitter), the Company’s website (e.g., the Company’s
 15 blog), press releases, and investor calls; and
- 16 (c) certify, in writing, compliance with undertaking (a) set forth above. The
 17 certification shall identify the undertaking, provide written evidence of
 18 compliance in the form of a narrative, and be supported by exhibits sufficient to
 19 demonstrate compliance. The Commission staff may make reasonable requests
 20 for further evidence of compliance, and Defendant agrees to provide such
 21 evidence. Defendant shall submit the certification and supporting material to
 22 Steven Buchholz, Assistant Regional Director, U.S. Securities and Exchange
 23 Commission, 44 Montgomery Street, 28th Floor, San Francisco, CA 94104,
 24 with a copy to the Office of Chief Counsel of the Enforcement Division, 100 F
 25 Street NE, Washington, DC 20549, no later than fourteen (14) days from the
 26 date of the completion of the undertaking.

27 6. Defendant waives the entry of findings of fact and conclusions of law pursuant to Rule
 28 52 of the Federal Rules of Civil Procedure.

7. Defendant waives the right, if any, to a jury trial and to appeal from the entry of the Final Judgment.

8. Defendant enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the Commission or any member, officer, employee, agent, or representative of the Commission to induce Defendant to enter into this Consent.

9. Defendant agrees that this Consent shall be incorporated into the Final Judgment with the same force and effect as if fully set forth therein.

10. Defendant will not oppose the enforcement of the Final Judgment on the ground, if any exists, ~~that he fails to comply~~ of lack of compliance with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

11. Defendant waives service of the Final Judgment and agrees that entry of the Final Judgment by the Court and filing with the Clerk of the Court will constitute notice to Defendant of its terms and conditions. Defendant further agrees to provide counsel for the Commission, within thirty days after the Final Judgment is filed with the Clerk of the Court, with an affidavit or declaration stating that Defendant has received and read a copy of the Final Judgment.

12. Consistent with 17 C.F.R. § 202.5(f), this Consent resolves only the claims asserted or that could have been asserted against Defendant in this civil proceeding. Defendant acknowledges that no promise or representation has been made by the Commission or any member, officer, employee, agent, or representative of the Commission with regard to any criminal liability that may have arisen or may arise from the facts underlying this action or immunity from any such criminal liability.

Defendant waives any claim of Double Jeopardy based upon the settlement of this proceeding, including the imposition of any remedy or civil penalty herein. Defendant further acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding. In addition, in any disciplinary proceeding

1 before the Commission based on the entry of the injunction in this action, Defendant understands that
 2 he shall not be permitted to contest the factual allegations of the complaint in this action.

3 13. Defendant understands and agrees to comply with the terms of 17 C.F.R. § 202.5(e),
 4 which provides in part that it is the Commission's policy "not to permit a defendant or respondent to
 5 consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or
 6 order for proceedings," and "a refusal to admit the allegations is equivalent to a denial, unless the
 7 defendant or respondent states that he neither admits nor denies the allegations." As part of
 8 Defendant's agreement to comply with the terms of Section 202.5(e), Defendant: (i) will not take any
 9 action or make or permit to be made any public statement denying, directly or indirectly, any allegation
 10 in the complaint or creating the impression that the complaint is without factual basis; (ii) will not make
 11 or permit to be made any public statement to the effect that Defendant does not admit the allegations of
 12 the complaint, or that this Consent contains no admission of the allegations, without also stating that
 13 Defendant does not deny the allegations; (iii) upon the filing of this Consent, Defendant hereby
 14 withdraws any papers filed in this action to the extent that they deny any allegation in the complaint;
 15 and (iv) stipulates solely for purposes of exceptions to discharge set forth in Section 523 of the
 16 Bankruptcy Code [11 U.S.C. § 523] ~~that the allegations in the complaint are true, and further,~~ that any
 17 debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Defendant under the
 18 Final Judgment or any other judgment, order, consent order, decree or settlement agreement entered in
 19 connection with this proceeding, is a debt for the violation by Defendant of the federal securities laws
 20 or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy
 21 Code [11 U.S.C. § 523(a)(19)]. If Defendant breaches this agreement, the Commission may petition
 22 the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this
 23 paragraph affects Defendant's: (i) testimonial obligations; or (ii) right to take legal or factual
 24 positions in litigation or other legal proceedings in which the Commission is not a party. Nothing in
 25 this Agreement is intended to have preclusive effect in any other proceeding in which the Commission
 26 is not a party.

27 14. Defendant hereby waives any rights under the Equal Access to Justice Act, the Small
 28 Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from the

United States, or any agency, or any official of the United States acting in his or her official capacity, directly or indirectly, reimbursement of attorney's fees or other fees, expenses, or costs expended by Defendant to defend against this action. For these purposes, Defendant agrees that Defendant is not the prevailing party in this action since the parties have reached a good faith settlement.

15. Defendant agrees that the Commission may present the Final Judgment to the Court for signature and entry without further notice.

16. Defendant agrees that this Court shall retain jurisdiction over this matter for the purpose of enforcing the terms of the Final Judgment.

Dated: September __, 2018

Elon Musk

On _____, 2018, _____, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.

Notary Public
Commission expires:

Approved as to form:

~~Steve~~ Steven M. Farina
Williams & Connolly LLP
725 Twelfth Street N.W.
Washington, DC 20005
Attorney for Defendant

EXHIBIT 11

Tesla, Inc.

Senior Executives Communications Policy

December , 2018

Policy

- An Authorized Executive may use Written Communications to disseminate information relating to Tesla, subject to this Senior Executives Communications Policy (this “Policy”) and subject to Tesla’s Disclosure Control and Procedures.
 - “Authorized Executive” means Tesla’s Chief Executive Officer (“CEO”), Head of Communications (who shall receive appropriate guidance from the General Counsel) and any Tesla Vice President or higher employee designated in writing by the CEO.
 - “Written Communication” means the communication of information through any written format, including social media (e.g., Twitter, Facebook, Instagram, LinkedIn, blogs), press releases, and any other means that have a high likelihood of being disseminated outside of Tesla, including on an unauthorized basis by others (e.g., Tesla worldwide employee communications and written materials for Tesla all-hands meetings). “Written Communications” also includes talking points, scripts, Q&A, or similar materials that are used or reasonably expected to be used in or to prepare for earnings calls, investor calls, conferences, shareholder interviews, publicized interviews, or any other oral communication that has a high likelihood of being disseminated outside of Tesla.
- Written Communications that contain, or reasonably could contain, information material to Tesla or its stockholders must, prior to posting or other publication, be submitted to Tesla’s General Counsel and Disclosure Counsel (or in the event of the General Counsel’s unavailability, Tesla’s Chief Financial Officer and Disclosure Counsel) for pre-approval. Authorized Executives are not authorized to post or publish Written Communications that contain, or reasonably could contain, information material to Tesla or its stockholders without obtaining pre-approval.
 - “Disclosure Counsel” means, with respect to this Policy, Tesla’s in-house securities law attorney who has been designated by the Disclosure Controls Committee of the Tesla Board of Directors (the “Committee”) to assist in reviewing Written Communications in accordance with this Policy.
- Information on the following subjects may be material to Tesla or its stockholders (it being noted that this is not an exhaustive list):
 - financial condition, statements or results, including earnings or guidance;
 - mergers, acquisitions, tender offers, joint ventures, or other fundamental transactions;
 - ~~initial~~ communications regarding new products, production progress or delays, sales or delivery numbers or other major business developments;
 - projections, forecasts, or estimates regarding Tesla’s business;
 - changes in control or significant changes in management;

- events regarding Tesla's securities or credit facilities; and
- any other significant legal or regulatory developments, including any event requiring the filing of a Form 8-K with the Securities and Exchange Commission or a pre-notification to Tesla's stock exchange.

- Any Written Communication that has been pre-approved should be disseminated outside of Nasdaq trading hours (specifically, between 1:00 pm PT and before 5:30 am PT). This ~~will-is~~ intended to allow all investors equal, unhurried access to such information and prevent possible halts in the trading of Tesla stock.
- If an Authorized Executive (i) further edits a pre-approved Written Communication, or (ii) desires to release a Written Communication more than two (2) days, after receipt of written pre-approval, such Authorized Executive will re-confirm the pre-approval in writing in accordance with this Policy prior to release.
- Proposed Written Communications that may be reasonably anticipated to invite controversy, should also be discussed in advance with the General Counsel and Disclosure Counsel, ~~even if such posts do to the extent not otherwise covered by this Policy. not directly involve Tesla.~~

Pre-Approval Process

- For any Written Communication ~~for which the Authorized Executive should reasonably believe~~ requires pre-approval pursuant to this Policy, the Authorized Executive will send a draft to Tesla's General Counsel and Disclosure Counsel (or in the event of the General Counsel's unavailability, Tesla's Chief Financial Officer and Disclosure Counsel) for review and pre-approval. The draft Written Communication will be reviewed for (i) content (i.e., accuracy and suitability of subject matter for the intended form of communication), (ii) word choice and (iii) timing. The reviewers may consult with any other appropriate Tesla personnel, including the members of the Committee, or third parties, such as outside legal counsel, as necessary.
- ~~Reviewers of draft Written Communications will be given sufficient time to permit them to reasonably undertake the process required by this Policy. adequate time to review such posts.~~
-

Monitoring and Audit

- The Committee and Tesla's General Counsel and Disclosure Counsel will periodically review past Written Communications, ~~and~~ provide guidance to the applicable Authorized Executive, and document any instances of non-compliance with the terms of this Policy.
- Tesla's internal audit function ~~may will~~ periodically audit compliance with this Policy and report any exceptions to the Committee.
- The Committee shall provide oversight over this Policy, and recommend to Tesla's Board of Directors any action to be taken in the event of any non-compliance with this Policy.
- This Policy shall be amended only by action of the Committee.